WESTERN ARIZONA CATV

IBLA 74-26 Decided April 18, 1974

Appeal from decision of Arizona State Office, Bureau of Land Management, requiring rental for communication site right-of-way application A- 6487.

Affirmed as modified and remanded.

Appraisals

> Where an appraisal has followed established criteria in calculating the fair market value of rental for a right-of-way, it will be affirmed, absent a showing by positive and substantial evidence that the appraisal is in error.

Regulations: Interpretation--Rights-of-Way: Generally

> Where a right-of-way over public lands is occupied under advance permission before an application therefor is approved, rental for the right-of-way accrues from the date of such permission and no separate charge is to be made for rental for the period between the grant of advance permission and the issuance of the right-of-way.

Regulations: Interpretation--Rights-of-Way: Generally

> Where a regulation governing relinquishments of rights-of-way provides for refunds only for those full years remaining in the term originally granted, under a similar principle, an applicant will be liable for

rental for the year in which advance permission is granted for construction, prior to the grant of a right-of-way.

Regulations: Interpretation--Rights-of-Way: Act of March 4, 1911

When an applicant for a communications site right-of-way alleges facts on appeal, which, if correct, might allow its facilities to be included within the maximum limits of one area, as established by 43 CFR 2861.1(c), the case will be remanded to the Bureau of Land Management to determine the exact size and extent of a permissible communications right-of-way.

Rights-of-Way: Act of March 4, 1911

Without convincing evidence that the rental charge for a communications site is excessive, a right-of-way application for a television antenna site will be approved at the rental charge prescribed by the administering agency.

APPEARANCES: Western Arizona CATV by Alfred Wallner, President, Kalispell, Montana, for appellant: John J. McHale, Esq., Office of the Solicitor, Department of the Interior, Washington, D.C., for appellee.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Western Arizona CATV has appealed from a decision, dated March 20, 1973, of the Arizona State Office, Bureau of Land Management, which set forth the rental required for approval of a right-of-way for a microwave transmitting site and television receiving sites.

The public lands involved include part of the SW 1/4 section 29, T. 3 N., R. 20 W., G.& S.R.M., Yuma County, Arizona, otherwise known as the top of Cunningham Mountain. The application was filed, by letter, on August 31, 1971, and advance permission for construction was granted October 20, 1971, pursuant to 43 CFR 2801.1-4(a) (1972). 1/ A grant of a right-of-way for a communication site is

1/ 43 CFR 2801.1-4(a) was revised in 1973. The current provision for advance permission for rights-of-way, 43 CFR 2812.2-3, pertains only to O&C lands in Oregon.

authorized by the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1970). The regulations issued pursuant to the statute generally limit line rights-of-way to a width of 100 feet and sites for structures or facilities to an area of 10,000 square feet. 43 CFR 2861.1(c). 2/

The decision appealed from established the rental at a rate of $600 per year. For the five year period from March 20, 1973, through March 19, 1978, a lump sum payment of $2565 could be paid. It also required payment of $1,200 for the period covered by advance permission for construction. This period ran from October 20, 1971, through March 19, 1973, or one year and five months. The decision required a total of $3,740 3/ to be paid to the State Office.

Appellant asserts it was delayed in initiating construction by the delay of the Federal Communications Commission (FCC) in issuing a construction permit, which delay was itself assertedly occasioned by the slowness of the Bureau of Land Management in transmitting to the FCC a notice of users of the lands involved, pursuant to 47 CFR 1.70(b). The record shows this notice was transmitted October 20, 1971, the same day the BLM granted appellant advance authorization to begin construction and informed it that the rental rate for the period permitted for construction prior to approval of a grant of a right-of-way would be "$600.00 per year or fraction thereof."

Appellant contends that because construction was not begun until March of 1972, it should not be liable for two years' rent. However, the regulation, 43 CFR 2801.1-4(a) (1972), under which advance permission for this construction was allowed, must be construed in pari materia with the one requiring a charge for use and occupancy of lands for rights-of-way. 43 CFR 2802.1-7(a). This latter regulation requires a charge equivalent to the fair market value of the right-of-way, "* * * as determined by appraisal by the authorized officer." Id. In addition, upon voluntary relinquishments of rights-of-way, the only refund provided is on that portion of the term spanning a whole year or years. 43 CFR 2802.1-7(a)(2). We note that appellant was granted permission by the FCC on December 13, 1971, to construct a community antenna relay station. In any event, where a right-of-way over public lands is occupied before application therefor is granted, the rental for the entire right-of-way accrues from the date of the initial entry. Utah Oil Refining Co., 57 I.D. 79 (1939). However, where the right-of-way

2/ Provision is made for sizes in excess of these limits, on "* * * a satisfactory showing of the need therefor." Id.

3/ This $3740 does not include a previous payment of $25.00.

user was authorized to enter earlier, e. g., under a grant of advance permission, rental accrues from the date of advance permission.

Appellant's second assertion of error in the decision of the State Office goes to the amount of the rental. In essence, it argues that:

(a) It should not be charged $200 for three sites because another of the BLM's grantees, El Paso Natural Gas Company, only pays $200 per year for its right-of-way, and "* * * all of the receiving antennas owned by the others [i.e., permittees of the Bureau of Reclamation, discussed infra] are scattered all over and none of them has a specific right-of-way on their receiving antennas."

(b) An operator of a nearby transmitter station has "* * * a site and seven lines running out of the site to other points on the mountain."

(c) Appellant was required, in order to obtain a right-of-way, to pay for a survey showing the location of all existing facilities.

The record shows that the Bureau of Reclamation, of this Department, El Paso Natural Gas Company, and Data Transmission Company had communication sites on Cunningham Mountain. In addition, Palo Verde Valley T.V. Club, Inc., the Arizona Highway Patrol, the Yuma County Sheriff's Department, and the Immigration and Naturalization Service, United States Department of Justice, were permittees of the Bureau of Reclamation of this Department.

Appellant charges that neither the Bureau of Land Management nor the Bureau of Reclamation has records of the location of the various sites occupied by the above-listed organizations. The record indicates that the Bureau of Reclamation received the initial right-of-way on Cunningham Mountain on April 22, 1957, pursuant to the Act of December 5, 1924, 43 U.S.C. § 417 (1970). Permits were issued by the Bureau of Reclamation to the aforementioned nonprofit and governmental organizations.

By letter of September 27, 1971, the Bureau of Reclamation transferred to the Bureau of Land Management the responsibility for administering the "contracts" issued by the Bureau of Reclamation to the operators of telecommunication equipment within the area held by the Bureau of Reclamation on Cunningham Mountain.

Furthermore, appellant's attempts to bring forth the facts involved in these other permissive uses is only relevant as they bear on whether appellant should be charged the rental assessed

by the State Office's decision of March 20, 1973. The regulation, 43 CFR 2802.1-7(a), establishing the procedure for determining the charge for use and occupancy, places that decision in the hands of the authorized officer, at "* * * the fair market value * * * as determined by appraisal * * *." Thus we must look to the record to see if the decision appealed from was based on a proper appraisal.

Appellant argues that the reason its area No. 2 enclosed 14,640 square feet in its application was due to uncertainty at the time of filing for the right-of- way. The uncertainty lay in the possible need for bracing wires or for a high tower. With its appeal, appellant has enclosed a photograph which shows two towers, one of which is used by the Immigration and Naturalization Service, United States Department of Justice, and the other used by itself which is no more than 30 feet high. Appellant's statement of reasons asserts that "* * * [i]n area No. 2 we have an approximate 10 foot by 10 foot concrete building with a 6 foot by 6 foot transmitting tower within ten feet of the building." Appellant further asserts that "[a]reas No. 1 and 3 are used only for our receiving antennas which receive signals from Phoenix and for our cable running from the receivers to the transmitter building."

If these assertions are correct, a single right-of-way encompassing the three areas of use may be practicable. We note that the statute authorizing rights- of-way for such facilities does not itself limit the length of easements for rights-of-way for "lines for communication purposes." 43 U.S.C. § 961 (1970). We also note the construction which the Court of Appeals for the District of Columbia Circuit gave a similar statute, 30 U.S.C. § 185 (1970), which governs rights-of-way for pipelines. There it was said that "* * * when the statute [Mineral Leasing Act of 1920, 30 U.S.C. § 185] provides for `twenty-five feet on each side' of the pipeline, it must provide not only for 25 feet on each side of the pipe, but also for 25 feet on each side of those facilities which constitute part of the `pipeline'." Wilderness Society v. Morton, 479 F.2d 842, 876 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973). 4/ It appears in the instant case that a line right-of-way with a width of less than 100 feet would be sufficient to encompass all parts of appellant's operations on Cunningham Mountain.

The BLM's appraisal report includes previous appraisals of similar sites in southwestern Arizona. Without convincing evidence that the rental charge for a communications site is excessive, a right-of-way application for a television antenna site will be approved at the rental charge. Marshall Brondum, A-29944 (March 23, 1964). Additionally, where it appears that an appraisal has followed

4/ Although this construction involved only a similar statute, we may take notice of it. 43 CFR 4.24(b).

established criteria in calculating the fair market value of rental for a right-of-way, that portion of a decision of the Bureau of Land Management which is based on such appraisal criteria will be affirmed, cf. Western Slope Gas Co., 10 IBLA 345 (1973), absent a showing by positive and substantial evidence that it is in error. Eugene G. Roguszka, 15 IBLA 1 (1974).

Accordingly, that portion of the decision below which, in essence, determined that appellant is to be charged for three communications sites, is remanded to the Bureau of Land Management for further consideration. However, that portion of the decision which, in effect, establishes the fair rental value of $200 for a communications site at the location involved, is affirmed. 5/

The decision appealed from fixes a rental of $1200 for the period of "[a]dvance period for construction" of October 20, 1971, through March 19, 1973, and recites that a lump sum of $2565 rental is due for the period of March 20, 1973, through March 19, 1978. Appellant had paid $25 towards these rentals, so the State Office called for a payment of $3,740.

There is no specific warrant in the regulations for a discrete rental covering the period from the grant of advance permission to the actual grant of the right-of-way. See 43 CFR 2802.1-7 (1972). Accordingly, appellant should have been charged on a lump sum basis for the five-year period commencing October 1, 1971, through September 30, 1976 6/. Our rationale on this point stems from the often enunciated doctrine in our decisions that regulations should be so clear that there is no basis for an applicant's noncompliance with them before they are interpreted to deprive him of a right or to impose an additional burden on him. See Murphy Oil Corp., 13 IBLA 160 (1973).

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and remanded to the Bureau of Land Management for further consideration.

Frederick Fishman
Administrative Judge

5/ Judge Goss believes that the rental for a site, embracing the three use areas, should exceed $200.00 per year, if the total acreage thereof exceeds that of the average comparable area appraised for rental at $200.00

6/ At the end of this rental period, a new five-year rental period will commence.

We concur:

Douglas E. Henriques
Administrative Judge

Joseph W. Goss
Administrative Judge